Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MICHAEL J. FRYE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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16 pp

QUESTIONS PRESENTED

1. Whether the "balancing test" adopted by this Court for evaluation of delays under the Sixth Amendment's Speedy Trial Clause should also be applied to case of preindictment delay as judged by the Due Process Clause

2. Whether the concept of "presumed prejudice" as established in *Doggett* should be applied to preindictment delay cases.

3. Whether the trial court's finding of actual prejudice was clearly erroneous.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

MICHAEL J. FRYE, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

A Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

The Appellant, Michael J. Frye respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, *en banc*, entered in this proceeding on May 30, 1996, in order to resolve the conflict between various Circuits regarding the important Constitutional issues presented herein.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Fifth Circuit, the United States District Court and the report of the United States magistrate that give rise to this petition are attached to petition for certiorari filed with this Court by the Appellant's co-defendant, A. Guy Crouch as Appendix A. Mr. Crouch's appendix is hereby adopted and incorporated by reference herein.

JURISDICTION

This petition is filed to review the reversal by the Fifth Circuit *en banc* of the District Court's dismissal of an indictment for undue delay.

A panel of the Fifth Circuit had previously affirmed the District Court's dismissal. The judgment of the Fifth Circuit reversing the District Court was entered on May 30, 1996. Jurisdiction lies in this Court by virtue of the United States Constitution and 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

The indictment in this case charges the violation of 18 U.S.C. §§ 2, 371, 657, 1006, 1014, 1344. The substance of these provisions is not at issue in this appeal. This appeal rests on an interpretation of the Due Process Clause of the Fifth Amendment of the United States Constitution.

STATEMENT OF THE CASE

In 1992, the defendants were indicted for bank fraud, conspiracy, misapplication and false entries. These charges arose from transactions that were consummated in 1985. The thrust of the government's case is that the defendants engaged in a series of nominee loans to avoid loans-to-one-borrower limitations.

The transactions charged in the indictment involved a federally insured savings association, Delta Savings. Frye was a real estate developer and not affiliated with Delta Savings in any way. In 1985, a corporation owned by Frye acquired a parcel of real estate from Delta Savings with financing by Delta. The government contends that Frye was a nominee on this loan for another developer, Robert Ferguson. Ferguson had, in fact, solicited Frye as an investor in the property, and Frye and Ferguson entered into a "profit-sharing" agreement with regard to the eventual sale of the property. It is undisputed that a memorandum of the profit sharing agreement between Frye and Ferguson was recorded in the deed records and that Delta's loan documents made specific reference to the profit sharing agreement.

After being charged, Frye and his co-Defendant Crouch, filed motions to dismiss the indictment for undue prosecutorial delay. The District Court referred the motion to the Magistrate, who conducted an evidentiary hearing on the defendants' motion.

At the hearing, the defendants argued, and the Magistrate agreed, that the initial burden rests on them to show prejudice and that once that burden had been discharged, the burden then shifted to the government to justify the delay in bringing the prosecution. The defendants further argued that because of the extraordinary length of the delay that they were entitled to a finding of "presumed" prejudice. In the alternative, the defendants presented a substantial showing of actual prejudice. The evidence of actual prejudice offered by the defendants at the hearing included:

(i) Crouch had met, and freely cooperated, with federal agents who had assured him that he was not a target.

(ii) Crouch had delivered many original documents to the Federal Bureau of Investigation without retaining copies of the documents, again acting under the belief that he was not a target of the investigation.

(iii) Frye had destroyed virtually all of his records regarding the transaction through a routine document destruction when he relocated his offices in 1990. At the time Frye did not know that he was under investigation. The existence of his files on this transaction and their destruction was confirmed by Frye's former secretary and an index card file system that showed what documents had been destroyed. This records were particularly crucial to Frye's defense. The government indicated that it intended to introduce the testimony of a federal bank examiner who had a telephone conversation with Frye about the transaction in 1986. The examiner purportedly was to testify that Frye had admitted to him in the phone conversation that he was acting as a nominee. Frye's secretary testified that Frye made notes of all of his telephone conversations and that these notes were routinely filed in the corresponding business file. Frye argued at the hearing that the lost files would have either contained notes of the conversation that would have refreshed his recollection or there would have been no notes, supporting the inference that the conversation never took place.

(iv) Three key directors of Delta Savings, who participated in the approval of the subject transactions, had died before the indictment.

(v) An unindicted co-conspirator had died before the indictment.

(vi) The testimony of a psychologist that it is impossible for human beings to remember the details of complex business transactions after eight (8) years.

(vii) No copies of the profit sharing agreement were available from any source.

(viii) There was no original of a document that the government alleged had been forged. An FBI agent testified that the FBI document examiners only work with original documents.

(ix) The attorney who prepared the loan documentation testified that his file had been destroyed in a routine document destruction and that he had no independent recollection of the transaction. Additionally, the attorney testified that he could not even recall who was his client.

(x) Frye retained an attorney after Delta Savings began collection procedures. This attorney testified that he had also destroyed his file, he had no independent recollection of his representation of Frye.

(xi) The records custodian of the FDIC testified that the whereabouts of the original documents for Delta Savings was unknown, including critical minutes showing the approval of the subject transactions.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS ERRED IN NOT USING THE "BALANCING TEST" TO EVALUATE PREINDICTMENT DELAY UNDER THE DUE PROCESS CLAUSE.

It is universally agreed that this Court established that the Due Process Clause affords protection from the government's undue delay in bringing an indictment that is, nonetheless, within the applicable statute of limitations. *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971) and *United States v. Lovasco*, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977). It is also universally agreed that these two cases set out that the relevant factors to be considered are (i) the prejudice to the defendant and (ii) the reasons for the government's delay in bringing the prosecution. There has been, however, substantial disagreement over the method to be used to analyze these factors and the parties' relative burdens of proof in such an inquiry.

In this case the defendants contended that *Marion* and *Lovasco* suggest the application of a balancing test as proscribed in post-indictment, Sixth Amendment cases. *Baker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). Under this test, the defendants have the initial burden of proving prejudice and once demonstrated, the government must come forward to defend its reasons for delaying the prosecution. The government contended that it had no burden of proof and that the defendants had the burden of proving not only actual prejudice, but also that the government has intentionally delayed the prosecution to gain a tactical advantage.

The *en banc* opinion adopted the government position with the slight enlargement that any bad faith reason (other than to gain a tactical advantage) would trigger Due Process relief. Disagreement over the proper test to be applied has plagued the Circuits and the state courts.[1]

The principal reason that this Court should grant certiorari is to require the application of the balancing test in preindictment delay cases as it has in postindictment cases. There is no substantive distinction between preindictment and postindictment cases with respect to this issue. The *en banc* opinion is frontal attack on the propriety and workability of the balancing test. *Crouch* at 3869-3872. The *en banc* opinion is doctrinal limitation on the balancing test notwithstanding this Court's clear suggest as to its use. "*Marion* makes clear that proof of prejudice is *generally* a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for delay as well as the prejudice to the accused." *Lovasco* at 789 (emphasis added).

The "intentional delay" test proposed by the *en banc* opinion is, in fact, no Due Process protection at all from preindictment delay. This Court has previously noted the difficulties defendants and the courts would have in delving into the government's state of mind and knowledge. *Marion* at 321 n.13, S.Ct. at 464, n.13. The petitioner has found no case since *Marion* where a defendant has succeeded on a preindictment delay claim under the intentional delay test. Absent highly unlikely circumstances (*e.g.*, the testimony of a disgruntled former government agent), the adoption of the intentional delay standard effectively overrules the Constitutional principle of *Marion* and *Lovasco*.

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[1] Professor McCabe ably catalogs the current state of the circuit law with respect to this issue in his petition for certiorari of Mr. Frye's co-defendant, Mr. Crouch recently filed with this Court. That discussion is hereby adopted and incorporated by reference.

II. THE COURT OF APPEALS ERRED IN NOT APPLYING THE CONCEPT OF PRESUMPTIVE PREJUDICE TO PREINDICTMENT DELAY CASES.

This Court has established the concept of "presumptive prejudice" in Sixth Amendment, Speedy Trial cases. *Doggett v. United States*, 505 U.S. 647, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992). The unusual postindictment facts of *Doggett* are indistinguishable from a preindictment delay case. The district court agreed with this proposition and concluded that presumed prejudice should also be applied to cases of extraordinary preindictment delay. "Prejudice is prejudice; it may take many forms, but does not change in substance. If post-accusation delay of eight and one-half years results in a presumption of prejudice, it is difficult to imagine why the eight year pre-accusation delay in this case would not come to the aid of the Defendants Crouch and Frye." 835 F.Supp. at 942.

The *en banc* opinion reversed this finding, again on the doctrinal, nonsubstantive distinction that *Doggett* is a Sixth Amendment case. *Crouch* at 3872-73. Relying entirely on circuit authority, the *en banc* opinion ignores the clear indication of this Court that there is substantial overlap in the Constitutional principles applicable to both fact situations. (*E.g., see Lovasco* at 796, 97 S.Ct. at 2052 n. 19, referring to the delay discussion in Justice Brennan's concurring opinion *Dickey v. Florida*, 398 U.S. 30, 90 S.Ct. 1564, 26 L.Ed.2d 26 (1970), a Sixth Amendment, Speedy Trial case.) Ironically, when the *en banc* opinion finds it beneficial, it was not reluctant to rely on Sixth Amendment case authority to support its views. " . . . unlike the protection afforded by the Double Jeopardy Clause, the Speedy Trial Clause does not . . . encompass a right not to be tried which must be upheld prior to trial if it is to be enjoyed at all. The same conclusion applies, *a fortiori*, to due process claims of preindictment delay." *Crouch* at 3873-74, *quoting United States v. MacDonald*, 435 U.S. 850, 861, 98 S.Ct. 1547, 1553, 56 L.Ed.2d 18 (1978).

III. THE COURT OF APPEALS ERRED IN REVERSING THE TRIAL COURT'S FINDING OF ACTUAL PREJUDICE.

The *en banc* opinion also reversed the district court's finding that the defendants had suffered actual prejudice as a result of the government's delay in bring the prosecution. It is agreed that a district court's finding of fact should only be reversed on appeal if they are "clearly erroneous." This Court has consistently held that "where the evidence would support a conclusion either way and where the trial court has decided it to weigh more heavily for the defendant . . . [s]uch a choice between two permissible views of the weight is not 'clearly erroneous'." *United States v. Yellow Cab Co.*, 338 U.S. 338, 342, 70 S.Ct. 177, 179, 94 L.Ed. 150 (1949); *Amadeo v. Zant*, 486 U.S. 214, 225, 108 S.Ct. 1771, 1778, 100 L.Ed.2d 249 (1988) ["We have frequently emphasized that 'where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous'."] Ironically, the Fifth Circuit has taken even a harsher view by holding that the trial court's findings are not clearly erroneous unless they are "not plausible in light of the record taken as a whole." *United States v. Alaniz-Alaniz*, 38 F.3d 788, 790 n. 3 (5th Cir. 1994). In fact, Justice Garwood, the author of the *en banc* opinion has recently indicated his own concurrence with this standard. "A factual finding is not clearly erroneous if it is plausible in light of the record read as a whole." *United States v. Zuniga*, 18 F.3d 1254, 1261 (5th Cir. 1994).

As set out above, the magistrate, the trial judge, and the chief judge of the Fifth Circuit and one associate justice have concluded that the defendants have suffered actual prejudice by the delay in this case. The defendants, recognizing the substantial burden that foregoing cases had placed on them, presented specific and voluminous evidence of prejudice. The hearing before the magistrate lasted for an entire day and involved nine witnesses and hundreds of pages of documents. The fact that the *en banc* opinion requires five pages and twelve footnotes to dispute that there has been any actual prejudice is the best indication that the finding was "plausible in light of light of the record read as a whole."

The *en banc* opinion's reversal of the trial court's finding of actual prejudice has two detrimental effects. First, it seriously undermines the "clearly erroneous" standard. If this standard merely is a subjective "length of the Chancellor's foot" (to use Judge Garwood's analogy), then it becomes a meaningless tool for judicial manipulation to achieve predetermined results. Also, there will never be a better showing of actual prejudice than the record in this case. Never before, have defendants mounted such a detailed, specific and documented showing of prejudice. Recognizing, as the courts frequently have, the limitations in proving prejudice in the first place, if these defendants have not cleared the bar, no one ever will. Therefore, once again, the *en banc* opinion has practically eliminated any Due Process protection against preindictment delay.

CONCLUSION

The Fifth Circuit's *en banc* opinion, while paying lip service to *Marion* and *Lovasco*, make the protection alluded to therein an impossible dream. By holding (i) that the defendant must prove bad intentions by the government, (ii) that a defendant may not rely on presumed prejudice regardless of the length of the delay and by (iii) finding that the facts of this case do not even support a finding of actual prejudice, the Fifth Circuit has, as a practical matter, overruled the principle of *Marion* and *Lovasco* that the Due Process Clause provides some protection from preindictment delay. The Petitioner respectfully requests that this Court grant this petition of a writ of certiorari for the purpose of clearly defining the rights that are afforded by the Due Process Clause in cases of preindictment delay.

Respectfully submitted this 22d day of August, 1996.

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Nos. 96-315 and 96-319

In the Supreme Court of the United States

OCTOBER TERM, 1996

A. GUY CROUCH, III, PETITIONER

v.

UNITED STATES OF AMERICA

MICHAEL J. FRYE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners were entitled to pre-trial dismissal of the indictment because of preindictment delay.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-315

A. GUY CROUCH, III, PETITIONER

v.

UNITED STATES OF AMERICA

No. 96-319

MICHAEL J. FRYE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. A1-A70)[1] is reported at 84 F.3d 1497. The panel opinion of the court of appeals (Pet. App. B1-B27) is reported at 51 F.3d 480. The order of the district

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[1] Unless otherwise indicated, all citations to the petition and petition appendix refer to No. 96-315.

court dismissing the indictment (Pet. App. C1-C20) is reported at 835 F. Supp. 938.

JURISDICTION

The judgment of the court of appeals en banc was entered on May 30, 1996. The petition for a writ of certiorari was filed on August 26, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In the United States District Court for the Southern District of Texas, petitioner Crouch was indicted for conspiracy to commit bank fraud, in violation of 18 U.S.C. 371; bank fraud, in violation of 18 U.S.C. 1344; misapplication of bank funds, in violation of 18 U.S.C. 657 (seven counts); false entries, in violation of 18 U.S.C. 1006 (five counts), and false statements, in violation of 18 U.S.C. 1014 (five counts). On five of the 19 counts, petitioner Frye was also indicted. The district court dismissed the indictment for unlawful preindictment delay. Pet. App. C1-C20. The court of appeals affirmed the dismissal. *Id.* at B1-B27. The en banc court of appeals reversed. *Id.* at A1-A70.

1. Petitioner Crouch was the chairman of the board and a loan committee member of Delta Savings Association (Delta), a federally insured savings and loan association in Alvin, Texas, from January 1985 until his resignation in September 1996. He was also Delta's attorney, as well as the half-owner, with his father, of a title company that closed Delta loans. Pet. App. A7. Petitioner Frye was a real estate investor and developer. The indictment alleged that from December 1984 to August 1985, Crouch and Robert Ferguson, a real estate broker and investor, developed a scheme to rid Delta's records of various tracts of land that Delta had acquired through foreclosure. As

part of the scheme, Ferguson was required to provide persons willing to pretend to be bona fide buyers of the property and to sign loan contracts to purchase the real estate. Ferguson induced petitioner Frye and Kerry Shawell to act as sham buyers of the property on behalf of Ferguson for the purpose of avoiding limitations on loans to one borrower. *Id.* at A10-A12.

Delta failed shortly afterwards. In March 1986, federal regulators discovered petitioners' scheme while examining Delta's records. Criminal referrals issued for Carl Gerjes (Delta's president), Ferguson, and petitioners. The government initially focused its investigation on Gerjes and Ferguson, which led to Gerjes' conviction in 1989 and his guilty plea to separate but related offenses in 1992, and to Ferguson's conviction in 1992. As a result of the shortage of personnel at the local FBI office, the investigation of petitioners' case was delayed. Pet. App. A16-A17. Meanwhile, in response to the savings and loan scandal of the 1980s, in 1989 Congress extended the statute of limitations for financial institution offenses to ten years. See 18 U.S.C. 3293. Without that amendment, the statute of limitations for petitioners' crimes would have expired in 1990. Pet. App. A16; *id.* at D2.

In 1990, following Gerjes' first conviction and the addition of more agents to the local FBI office, the government focused its attention on petitioners' case. The instant indictment issued on November 12, 1992. Pet. App. A17-A18, B3.

2. Petitioners moved to dismiss the indictment for undue preindictment delay, in violation of the Due Process Clause. The district court granted the motion and dismissed the indictment. The district court concluded that the delay in prosecuting petitioners

was "presumptively prejudicial." It noted that several defense witnesses had died in the interim, and that several potentially important documents were missing. Pet. App. C10-C16. The district court also held that the government's explanation for the delay—the low priority assigned to petitioners' case and a manpower shortage—showed that it had been negligent in prosecuting petitioners. The court stated that the record did not support a finding that the delay was caused by bad faith, but stated that "bad faith" could not be ruled out. *Id.* at C13.

3. On the government's appeal, a panel of the court of appeals affirmed by a divided vote. The panel ruled that in preindictment delay cases, the defendant must show that he was actually prejudiced by the delay. If he meets that test, it is necessary to engage in a balancing of the government's reason for delay against the prejudice shown to the defendant. Applying that standard, the panel concluded that petitioners had shown actual prejudice from the deaths of several witnesses and the loss of certain bank documents. It also held that the reason for the government delay did not outweigh the prejudice to petitioners. Pet. App. B1-B27.

The en banc court of appeals reversed and ordered reinstatement of the indictment. The court ruled first that where an indictment is returned within the statute of limitations, preindictment delay does not violate due process unless, in addition to causing the defendant actual prejudice, the defendant shows that the delay was intentionally brought about by the government to obtain some tactical advantage over the defendant or for some other bad faith purpose. The court rejected petitioner's argument that prejudice can be presumed from the length of the delay

and that the reasons for the delay must be balanced against the prejudice to the defendant. Pet. App. A65.

Next, the court ruled that the actual prejudice requirement refers to prejudice at trial. Accordingly, a showing of possible or potential trial prejudice is insufficient. For that reason, a district court should ordinarily defer ruling on a pretrial motion to dismiss the indictment for preindictment delay until after the verdict, when the assessment of prejudice can more accurately be made. Pet. App. A66.

Applying those standards, the court ruled that petitioners did not meet either the bad faith or the actual prejudice requirements. The court concluded that the reasons for the delay—the lack of manpower and the low priority assigned to the case—did not constitute an effort by the government to gain a tactical advantage over the defendant or for some other bad faith purpose. Pet. App. A20-A43.

The court also held that petitioners failed to demonstrate actual prejudice. The court rejected Crouch's claim that he was prejudiced by the deaths of six potential defense witnesses. The court observed that two witnesses died in 1987 or 1988, before any delay that was even arguably undue, and that the six witnesses would not have provided information favorable to Crouch. The court ruled that Crouch's admission that he could not identify any lost documentation demonstrated that no favorable documents were lost as a result of the delay. Pet. App. A52-A57. The court went on to reject Frye's claim that favorable documents were lost during the period of delay, and explained that he had made only a speculative claim of prejudice in most instances. The court acknowledged that one of the allegedly lost documents might be material to an allegation in a false statement count

(Count 18) against Frye, but stated that prejudice to Frye could be obviated by striking that allegation from that count. *Id.* at A57-A64.

Two judges dissented on the ground that the district court's finding of actual prejudice was not clearly erroneous, and that the government's reasons for the delay were not justified. Pet. App. A66-A70.

ARGUMENT

Petitioners contend (96-315 Pet. 6-21; 96-319 Pet. 6-7) that the Due Process Clause of the Fifth Amendment requires dismissal of the indictment against them because of prejudicial preindictment delay. There is a conflict in the circuits on the standard for determining claims of preindictment delay, but that conflict is not directly presented on the facts of this case. Under either of the competing legal standards applied in the courts of appeals, petitioners would not be entitled to relief. Accordingly, further review is unwarranted.

1. The principal protection against preindictment delay is afforded by the applicable statute of limitations. Nevertheless, the Due Process Clause "has a limited role to play in protecting against oppressive delay" in the filing of an indictment. See, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 789 (1977). That limited protection, the Court ruled in *Lovasco* (*id.* at 789-790), is available only when the defendant has sustained actual prejudice from the delay, and the government's reasons for the delay are not adequate to justify going forward with a trial, in light of "fundamental conceptions of justice." *Id.* at 790-791 (citations and internal quotation marks omitted). The Court held that, while delay would not be justified where the government sought "to gain tactical advan-

tage over the accused," *id.* at 795 (quoting *United States* v. *Marion*, 404 U.S. 307, 324 (1971)), investigative delay does not deprive a defendant of due process, *ibid.* Investigative delay remains justifiable even when sufficient evidence exists to seek an indictment and even when the continued investigation focuses not on the defendant himself but on other participants in related criminal activity. See *Lovasco*, 431 U.S. at 791-796. Such "investigative delay is fundamentally unlike delay undertaken by the Government solely 'to gain tactical advantage over the accused.'" *Id.* at 795.

The lower courts have adopted different approaches in applying the *Lovasco* standard. As did the court below (Pet. App. A65), most courts of appeals have correctly ruled that relief is available only if the defendant is actually prejudiced and the government intended to delay the indictment in order to obtain a tactical advantage over the defendant or for some other bad faith purpose. See *e.g.*, *United States* v. *Hayes*, 40 F.3d 362, 365 (11th Cir. 1994), cert. denied, 116 S. Ct. 62 (1995); *United States* v. *Stierwalt*, 16 F.3d 282, 285 (8th Cir. 1994);[2] *United States* v. *Engstrom*, 965 F.2d 836, 839 (10th Cir. 1992); *United States* v. *Brown*, 959 F.2d 63, 66 (6th Cir. 1992); *United States* v. *Ismaili*, 828 F.2d 153, 167 (3d Cir.

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[2] In an earlier case, which petitioner Crouch cites (Pet. 7), the Eighth Circuit appeared to endorse a balancing test weighing the reasons for the delay against the actual prejudice to the defendant, once the defendant had demonstrated actual prejudice. *United States* v. *Savage*, 863 F.2d 595, 598 (1988). The Eighth Circuit does not appear to have recognized the intracircuit tension between its implicit acceptance of the majority approach in *Stierwalt* and its seeming endorsement of the minority view in *Savage*. In neither case, however, did the court dismiss the indictment, as the defendants had sought.

1987), cert. denied, 485 U.S. 935 (1988); *United States* v. *Hoo*, 825 F.2d 667, 671 (2d Cir. 1987), cert. denied, 484 U.S. 1035 (1988); *United States* v. *Crooks*, 766 F.2d 7, 11 (1st Cir.) (Breyer, J.), cert. denied, 474 U.S. 996 (1985). That reading of *Lovasco* is consistent with this Court's description of the due process violation in cases of preindictment delay as resting on actual prejudice and deliberate delay for the purpose of obtaining a tactical advantage. See *Arizona* v. *Youngblood*, 488 U.S. 51, 57 (1988); *United States* v. *Gouveia*, 467 U.S. 180, 192 (1984); *Marion*, 404 U.S. at 324.

Three circuits apply a "balancing" test in assessing a due process challenge for preindictment delay. The Ninth Circuit has held that if the defendant shows prejudice, the court must then balance the length of the delay against the government's reasons for the delay. See, *e.g.*, *United States* v. *Bracy*, 67 F.3d 1421, 1427 (9th Cir. 1995); *United States* v. *Valentine*, 783 F.2d 1413, 1416 (9th Cir. 1986). The Seventh Circuit has held that once the defendant shows prejudice, the burden shifts to the government to explain the reasons for the delay and that the court balances the prejudice against those reasons. See, *e.g.*, *United States* v. *Canoy*, 38 F.3d 893, 902 (7th Cir. 1994); *United States* v. *Sowa*, 34 F.3d 447, 451 (7th Cir. 1994), cert. denied, 115 S. Ct. 915 (1995). The Fourth Circuit has held that if the defendant shows actual prejudice from the delay, the court must balance the defendant's prejudice against the government's justification for the delay to determine whether the delay violated fundamental conceptions of justice or the community's sense of fair play and decency. *Howell* v.

Barker, 904 F.2d 889, 895 (4th Cir.), cert. denied, 498 U.S. 1016 (1990).[3]

The conflict in the circuits on this issue is not directly presented in this case. The circuits that apply a balancing test require the defendant to make a showing of actual prejudice before the reasons for the delay are examined. See, *e.g.*, *Bracy*, 67 F.3d at 1427 n.3; *Canoy*, 38 F.3d at 902; *Sowa*, 34 F.3d at 451; *Howell*, 904 F.2d at 895. As these courts have uniformly held, the defendant must establish actual prejudice in the first instance before the court will weigh the length of the delay against the government's reasons for the delay. The en banc court of appeals made a thorough and detailed inquiry into the deaths of the potential witnesses and the claims of lost documents in this case, and concluded that neither petitioner had shown actual prejudice. Even if the court of appeals had followed the precedents of the Fourth, Seventh, and Ninth Circuits, it would have had no duty to undertake a balancing analysis in this case. Accordingly, because petitioners would derive no benefit from any other court of appeals' approach, the case does not present an appropriate vehicle for resolving the conflict among the circuits.

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[3] In *Jones* v. *Virginia*, 94 F.3d 900 (1996), the Fourth Circuit questioned whether a balancing test is the proper standard under *Lovasco*. The court noted that most of the courts of appeals do not use a balancing test, and that a balancing test appears to be inconsistent with this Court's formulation of the *Lovasco* standard in *Gouveia*, *Youngblood*, and *Marion*. The court recognized, however, that only the en banc court could overrule *Howell*. 94 F.3d at 904-905. The court ruled that under the *Howell* balancing test, the defendant was not entitled to relief. 94 F.3d at 909.

In addition, the reasons for the delay in this case do not establish a due process violation. The indictment was delayed because of a shortage of investigative agents and because the prosecutors assigned a low priority to this case. Those actions were taken in the context of the savings and loan crisis in the 1980s, during which bank fraud cases overwhelmed the federal criminal justice system. See Pet. App. A41. The government's delayed action did not constitute a design to obtain a tactical advantage over petitioner or some other "bad faith" reason.

Finally, the difference between the two-pronged rule adopted by most courts of appeals and the balancing test used in three circuits appears to be more theoretical than real. When the defendant fails to show that the government delayed the indictment to obtain a tactical advantage or for some other bad faith reason, see pp. 7-8, *supra*, or when the record affirmatively shows that the government did not delay the proceedings to obtain a tactical advantage over the accused, see, *e.g.*, *Bracy*, 67 F.3d at 1427 n.3; *Canoy*, 38 F.3d at 901-902; *United States* v. *Automated Medical Labs., Inc.*, 770 F.2d 399, 403-404 (4th Cir. 1985), the courts that apply the balancing test have to date uniformly denied relief. While the issue presented is important and might warrant this Court's review in an appropriate case, that review should await a case in which it becomes clear that the different tests would produce different outcomes.

2. Petitioners argue (96-315 Pet. 17-21; 96-319 Pet. 8) that because of the long delay in their case, they should be entitled to a presumption of prejudice instead of being required to show actual prejudice. That claim lacks merit. The Court has repeatedly stated that a defendant must show actual prejudice in

order to establish a due process violation for preindictment delay. See *Lovasco*, 431 U.S. at 789; *Marion*, 404 U.S. at 323; see also *Gouveia*, 467 U.S. at 192.

Petitioners' reliance (96-315 Pet. 20-21; 96-319 Pet. 8) on *Doggett* v. *United States*, 505 U.S. 647 (1992), is misplaced. In *Doggett*, the Court held that a lengthy post-indictment delay is presumptively prejudicial for purposes of establishing a Sixth Amendment speedy trial claim. *Id.* at 655. The test for determining whether a defendant has been afforded a speedy trial under the Sixth Amendment, however, is not applicable in judging preindictment delays under the Due Process Clause. *Marion*, 404 U.S. at 320-321. The courts of appeals have unanimously concluded that *Doggett* has not changed the rule that requires the defendant to show actual prejudice in cases of preindictment delay. See *Jones* v. *Virginia*, 94 F.3d at 906-907 (collecting cases); *United States* v. *Foxman*, 87 F.3d 1220, 1222 (11th Cir. 1996); *United States* v. *Bischel*, 61 F.3d 1429, 1436 (9th Cir. 1995).

3. There is no merit to petitioner Crouch's argument (Pet. 13-17) that the court of appeals erred by instructing district courts to wait until after trial to decide whether the defendant proved actual prejudice and whether he is entitled to dismissal of the indictment. The court below reasoned that, because actual prejudice is difficult to show in the abstract, a trial court should normally wait until after trial to determine whether the defendant has shown actual prejudice that warrants dismissal of the indictment. Pet. App. A50-A51. The court did not make that an inflexible requirement, because it specifically recognized that there will be cases in which it will be "clear[] and most indisputable" that the defendant suffered actual prejudice before trial that would

warrant pretrial dismissal of the indictment. *Id.* at A65. The court of appeals' holding is reasonable and consistent with this Court's observations on that issue. See *Marion*, 404 U.S. at 326 ("[e]vents of the trial may demonstrate actual prejudice").[4] In any event, because at this stage of the proceedings petitioners have not shown actual prejudice from the delay, dismissal of the indictment would not be warranted.

4. Petitioner Frye contends (96-319 Pet. 9-10) that the court of appeals erred in reversing the trial court's finding of actual prejudice. That fact-bound claim merits no review.

The district court made a finding of "actual and presumptive" prejudice (Pet. App. C20), but it also concluded that it could not quantify the "actual prejudice" suffered by petitioners (*id.* at C13, C16). In reversing the district court, the en banc court of appeals ruled that the district court erred in relying on presumptive prejudice and specifically held that the district court's findings of actual prejudice "are

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[4] Petitioners' reliance (Pet. 16) on *United States* v. *Foxman*, 87 F.3d 1220 (11th Cir. 1996), is misplaced. Although the Eleventh Circuit in that case did affirm a pre-trial finding of actual prejudice, *id.* at 1222-1223, it ultimately ruled that the trial court erred in dismissing the indictment without making findings as to the reason for the delay. *Id.* at 1224. *Foxman* further observed that pre-trial dismissal for preindictment delay would be a "rare" event that that court had never found appropriate. While the court of appeals remanded for further pre-trial proceedings, it cautioned that it could not affirm a pre-trial dismissal absent "detailed findings supported by a well-developed record." *Id.* at 1224 n.4. That dictum is consistent with the view of the Fifth Circuit here. See Pet. App. A48 (pre-trial motion should be granted only in "the very clearest and most compelling cases").

not supported by the record and are clearly erroneous." *Id.* at A64.

The court concluded that the district court's findings were clearly erroneous based on a thorough review of each item of evidence that petitioners claimed was lost or destroyed during the delay in filing the indictment. Pet. App. A52-A64. Petitioner Frye's assertion that the court of appeals misapplied the "clear error" standard constitutes nothing more than a factual disagreement with the court of appeals' ruling. That dispute does not warrant this Court's review.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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